IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 178

J. BAKER BRYAN, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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OPINIONS BELOW

The decisions of the District Court for the Southern District of Florida on the three motions for judgment of acquittal are not supported by opinions; however, the denials of such motions appear in the record at pages 201, 206 and 14. The opinion of the Court of Appeals on the appeal was rendered on May 13, 1949 (R. 224-234) and is reported in 175 Fed. 2d, page 223. The opinion of the Court

of Appeals on the motion to amend the judgment was rendered on June 10, 1949 (R. 236-237) and is reported in 175 Fed. 2d, page 228, immediately following the decision on the appeal.

JURISDICTION

The judgment of the Court of Appeals reversing and remanding for a new trial was entered May 13, 1949 (R. 235) (175 Fed. 2d 223); and, the order denying the petitioner's motion to amend the judgment was entered June 10, 1949 (R. 238) (175 Fed. 2d 228). The petition for certiorari was filed July 8, 1949 and certiorari granted on October 10, 1949. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and Rule 37 of the Federal Rules of Criminal Procedure.

STATEMENT

The issue before the Court is purely one of petitioner's rights arising out of the new procedure under the Federal Rules of Criminal Procedure and results from petitioner's motion to amend the judgment of the Court of Appeals for the Fifth Circuit substituting a judgment for acquittal for an order for a new trial and the denial of that motion. The petitioner sought and was granted certiorari on this single issue. The Government did not seek certiorari on any grounds.

In a criminal case, the Court below held that the evidence was insufficient to make out a *prima facie* case against the defendant and the case should not have been submitted to the jury (R. 231)—it therefore reversed and remanded for a new trial. Counsel for the defendant filed a motion to amend the judgment of remand so that it would provide for the entry of a judgment of acquittal instead of a new trial (R. 235a). The Court below denied this motion (R. 238), explaining that it ordered a new trial thinking that the insufficiency in the evidence might be cured on a new trial (R. 236). In ordering a new trial, the Court below

relied for its power to do so on Section 2106 of Title 28, U.S.C.A. (R. 237) and questioned whether Rule 29 of the Federal Rules of Criminal Procedure controlled its action; holding that, if it did, the power to grant a new trial was stated therein (R. 237).

The Court of Appeals for the Fifth Circuit had before it on appeal three motions that were denied by the trial court—one for judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure, made at the close of the prosecution (R. 200-201); another for judgment of acquittal under the same rule (Rule 29(a)) made at the close of all the evidence (R. 206); and, a third motion for judgment of acquittal, or, in the alternative, a new trial made after verdict within the purview of Rule 29(b) (R. 11-13). A number of issues were raised on the appeal, some directed to a judgment of acquittal and others to a new trial. The Court below passed on only the one issue deeming it unnecessary to pass upon the other specifications of error.

The only issue before this Court is the action of the Appellate Court on your petitioner's motion to amend the judgment praying that it direct a judgment of acquittal in place of the direction for a new trial.

The position of your petitioner is that the Court below, having found that the evidence was insufficient to warrant the submission of the case to the jury, was required to do what the trial judge would have been compelled to do under Rule 29(a) of the Federal Rules of Criminal Procedure, had he ruled correctly on the motions for judgment of acquittal; or, if it be held that such rules do not govern the action of the appellate courts, then, the Appellate Court in denying petitioner's motion to direct a judgment of acquittal failed to direct an appropriate and just order as provided by Section 2106, Title 28, U.S.C.A.

SPECIFICATION OF ERRORS

The United States Court of Appeals for the Fifth Circuit erred:

1. In denying the motion to amend the judgment to conform to Rule 29(a) of the Federal Rules of Criminal Procedure upon holding that the evidence was "insufficient to make out a *prima facie* case against the Defendant" (R. 236).

2. In holding that a new trial, instead of a judgment of acquittal, is an "appropriate" (Sec. 2106, Title 28, U.S.C.A.) and "just" (Sec. 2106, Title 28, U.S.C.A.) order upon a holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 231).

3. In failing to order that the motion for a judgment of acquittal made at the conclusion of all the testimony (R. 206) be granted, upon a holding that "the case should not have been submitted to the jury" (R. 231).

4. In holding that despite the holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 231), it had an election to grant a new trial instead of a judgment of acquittal.

5. In relying on the authority granted in Section 2106 of Title 28 U.S.C.A., instead of the more specific direction stated in Rule 29(a) of the Federal Rules of Criminal Procedure.

6. In failing to order, upon a holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 231), what the trial judge was required to order upon a similar holding; that is, the entry of a judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure.

7. In ordering a new trial, instead of a judgment of acquittal, on a holding "that the evidence presented did not authorize a verdict of guilty" (R. 236).

8. In "thinking the defect in the evidence might be supplied on another trial" (R. 236) to be an "appropriate" (Sec. 2106, Title 28, U.S.C.A.) and "just" (Sec. 2106, Title 28, U.S.C.A.) reason for ordering a new trial instead of a judgment of acquittal.

9. In holding that the prosecution, having had its day in Court, and "the evidence presented did not authorize a verdict of guilty" (R. 236) was entitled to a new trial in order that "the defect in the evidence might be supplied on another trial" (R. 236).

10. In ordering a new trial, instead of a judgment of acquittal, one judge dissenting, upon a majority holding "that the evidence presented did not authorize a verdict of guilty" (R. 236) and the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 231).

11. In depriving the Defendant of the right to a judgment of acquittal which accrued to him at the close of all the evidence upon holdings that the evidence was "insufficient to make out a *prima facie* case against the Defendant" (R. 231), that "the case should not have been submitted to the jury" (R. 231), and that "the evidence presented did not authorize a verdict of guilty" (R. 236).

12. In failing to protect the Defendant's rights under the Fifth Amendment to the Constitution by making an order that places him in double jeopardy.

ARGUMENT

Summary

There is but one issue before the Court and that is whether—upon findings by the Court of Appeals, that the evidence was insufficient to make out a *prima facie* case against the Defendant (R. 231); that the case should not have been submitted to the jury (R. 231); and, that the evidence presented did not authorize a verdict of guilty (R. 236)—the

Defendant is entitled to a judgment of acquittal, under Rule 29 of the Federal Rules of Criminal Procedure and Section 2106 of Title 28, U.S.C.A.; or, whether the Appellate Court can upon such findings restrict the relief to the Defendant to a new trial. The petitioner sought and was granted certiorari on this single issue—the Government did not seek certiorari on any grounds.

Our contentions are:

That there is a clear distinction between the basis for a new trial and a judgment of acquittal, the grounds for each being of a different character; and, where, as here, the Court finds that the case should not have been submitted to a jury (R. 231); the only "appropriate" and "just" judgment is a judgment of acquittal. This is true whether the Court acts under the Federal Rules of Criminal Procedure, or, under Section 2106 of Title 28, U.S.C.A. (Judiciary and Judicial Procedure); and

That the thought of the majority of the Court that the insufficiency in the evidence might be supplied in another trial (R. 236) is not a sufficient or valid reason for denying to the Defendant a judgment of acquittal. The prosecution has had its day in Court and has failed to make out a *prima facie* case. Why should it be permitted to try again? If it is permitted a second chance, why not a third, or fourth, or fifth chance? To give the prosecution another chance to supply additional evidence in the hope that it can make out a *prima facie* case would be intolerable—on such a theory a Defendant could be kept in Court defending himself for the rest of his life; and

That the function of the Court of Appeals in examining the record of a trial court is to correct the errors of the trial court and give to the Defendant the judgment that the trial court would have been required to give had it ruled correctly; and

That the Federal Rules of Criminal Procedure are applicable to the Court of Appeals by express language set forth in such rules; and

That the provisions of Section 2106 of Title 28, U.S.C.A. are not in conflict with the Federal Rules of Criminal Procedure; and, it would appear that they are no authority for the Court's mandate. However, the only appropriate and just judgment following a finding that the evidence is insufficient to sustain a verdict of guilty is a judgment of acquittal; and

That to require the Defendant to stand trial a second time subjects him to double jeopardy and is an invasion of his rights under the Fifth Amendment to the Constitution. Under the Federal Rules of Criminal Procedure, the right to a judgment of acquittal accrued to the Defendant before the jury began its deliberations. He did not waive that right by appealing from the ruling of the trial judge. Before these rules become effective, the power of the trial court was limited to directing the jury to acquit; and the Defendant waived the double jeopardy protection by his successful appeal. Now, however, under the Rules, he has a right that accrues to him, and he waives nothing by appealing—in fact he maintains and presses his right.

Point I

Distinction Between Grounds for a New Trial and Judgment of Acquittal

The Court of Appeals in its opinion denying the petitioner's motion to amend the judgment begins with the following language (R. 236):

> "On the appeal of the accused this court set aside the verdict and sentence and ordered a new trial. This was on the ground that the evidence presented did not authorize a verdict of guilty, one judge dissenting. The majority thinking the defect in the evidence might be supplied on another trial directed that it be had."

We think that the holding that the evidence did not authorize a verdict of guilty leaves the Court no alternative but to remand the case with a direction to enter a judgment

of acquittal. The Court in its original opinion used the following language (R. 231):

> "* * * the evidence, in the light of the bill of particulars, was insufficient to make out a *prima facie* case against the Defendant on the net worth-expenditure basis, and the case should not have been submitted to the jury * * *."

This Court in *Montgomery Ward & Co.* v. *Duncan* (311 U.S. 243, 251) had occasion to distinguish the grounds upon which a motion for judgment rests as contrasted to a motion for new trial. This was a civil case, and the counterpart of Rule 29 (Rule 50 of Federal Rules of Civil Procedure) was at issue. The Court said (p. 251):

> "Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; any may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

If the Court below had reversed the trial court for the refusal to grant a better bill of particulars; or, because the trial ended with but eleven jurors; or, on the grounds of admission of improper testimony; or, due to prejudicial remarks by Judge or Counsel; a new trial would have been a proper order. However, where, as here, the prosecution has failed to make out a case, there is but one remedy, and that is a judgment of acquittal.

Mr. Justice Minton, then a Justice of the Seventh Circuit, wrote the opinion of the Court in *United States* v. *Jones* (174 Fed. 2d 746), decided June 9, 1949. That case

involved a motion for discharge at the conclusion of all the evidence, and the Court treated the motion as the equivalent of a motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure. In its opinion the Court said (p. 749):

> "There is a total failure of proof as to venue, and the motion 'for discharge' at the conclusion of all the evidence should have been sustained."

and reversed the decision. No new trial was ordered, and none had been had. The text of the opinion clearly indicates the matter was closed by the reversal, and all parties appear to have accepted it as such.

The order to be made by the Appellate Court is not a matter of grace—once it establishes the basis for its reversal the appropriate and just order must follow. Its duty is to make such order as is required by the law and the facts, that is, a judgment of acquittal if, as here, the prosecution did not make out a case; or, a new trial if there has been other prejudicial error. We believe that under holdings such as we have in the case at bar, the only sound judicial order is a judgment of acquittal. Rule 29(a) of the Federal Rules of Criminal Procedure requires that it be done; and Section 2106 of Title 28, U.S.C.A., requires it as an appropriate and just judgment.

Point II

Another Chance for the Prosecution Is Not Justice for the Defendant

The sole reason for the Circuit Court's action in ordering a new trial is best expressed in its own words (R. 236):

> "The majority thinking the defect in the evidence might be supplied on another trial directed that it be had."

That seems a specious reason to deny the Defendant his due—a judgment of acquittal. Such reason is not sup-

ported by law or fact. The fact is that there was not sufficient evidence to warrant the submission of the case to the jury; the law is that the insufficiency of the evidence requires a judgment of acquittal (Rule 29(a) Federal Rules of Criminal Procedure).

The prosecution had its day in Court—it put forward such evidence as it had. That evidence proved insufficient to make out a *prima facie* case. Why, and by what principle of law can the prosecution be entitled to or hope for another attempt to patch up its case? What basis is there for the Circuit Court to "think" that the prosecution has evidence it did not see fit to introduce? Mere speculation has no province in the disposition of a criminal case involving a man's liberty.

If, under the circumstances here prevailing, a new trial was to ensue, what is to prevent a third, or a fourth, or a fifth trial, etc. Is the prosecution upon being told it has not made out a case to be progressively given successive opportunities to make out a case? To direct attention to the possibility of successive trials is not idle talk—the same reasoning that prompts a second trial holds good for the demand for successive trials.

The Seventh Circuit had a somewhat similar problem to meet in *Ex Parte United States* (101 Fed. 2d 870) decided in 1939 before the Federal Rules of Criminal Procedure were in existence, affirmed by this Court by an evenly divided Court (308 U. S. 519). There, without the benefit of right established by the Rules, the Court was considering a petition for writ of mandamus, by the United States seeking to require the trial court to set aside two orders dismissing defendants and to direct new trials. The Court, speaking through Circuit Judge Kerner, said (p. 878):

> "The essence of legal power is to take the case away from the jury, where there is an insufficiency of evidence to sustain a conviction. The power to direct a verdict and the power to render a judgment of dismissal pursuant to the reservation of the legal question are clearly incidental to, and necessarily flow from,

> the judicial function of determining the legal sufficiency of the evidence. The court has inherent power to invoke these procedural aids in its effort to administer criminal justice."

and, after tracing the legal power, the Court goes on to say:

> "To agree with petitioner that the prosecution is entitled to a new trial as a matter of right, after the issues have been fully tried in a trial by judge and jury and after the government has failed to prove its case against the defendants, is a monstrous penalty to impose upon the defendants."

In the above case the Court did not have the benefit of legislation as reflected in the Rules—still it had no difficulty in meeting the problem. It said:

> "In substance there is no difference between a directed verdict of acquittal and a judgment of dismissal. It is only when the procedural change is fundamental and substantial injustice occurs that one of the litigants should be allowed to complain. In this case the Government, as well as the defendants in the criminal case, has a thoroughly considered ruling on an important legal question, which is exclusively within the province of the court."

The legal question was the insufficiency of the evidence and the Circuit Court denied the Government the petition for writ of mandamus. Here, in the case at bar, we also have the holding of insufficiency of the evidence and in addition Rule 29 providing for the proper relief—that is, judgment of acquittal.

Point III

Function of Appellate Court

We believe it to be elementary that the function of an appellate court is to correct the errors of the trial court. If there be errors of sufficient importance to affect the result, than a reversal is in order. Upon reversing, the

grounds for such reversal control the nature of the remedy. We have heretofore quoted from *Montgomery Ward & Co.* v. *Duncan* (311 U.S. 234, 251) the difference in the state of facts that call for a new trial and those that call for a judgment of acquittal.

When an appellate court corrects a trial court, it orders done what the trial court would have been required to do had it ruled correctly. Here the trial court should have ruled that the evidence was insufficient and that the case should not be submitted to the jury. Had the trial court so ruled, it would have been required under Rule 29(a) to enter a judgment of acquittal. That rule requires a specific act by the trial judge—it is not permissive, it is mandatory. The pertinent part reads:

> "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction or such offense or offenses."

Unless the appellate court will order the trial court to do what it would have been required to do, what purpose does the appeal serve? Assume arguendo, that the insufficiency of the evidence was the only issue on appeal. If the appellate court confined itself to the order of a new trial, and upon retrial the same evidence was again advanced, and the trial judge again acted incorrectly; upon the second appeal we would be right back where we started from—a stalemate. Certainly the appellate court can and must compel the trial court to do what the law (Rule 29) requires it to do by issuing an order for judgment of acquittal.

Point IV

Federal Rules of Criminal Procedure

The Circuit Court chooses to bottom its order on Section 2106 of Title 28, U.S.C.A., and does not consider Rule 29 applies to its action; but reasons that if it does, "the power to grant a new trial is stated therein."

The Fifth Circuit is the only circuit that, to our knowledge, questions the applicability of the Federal Rules of Criminal Procedure. Three different circuits have followed Rule 29 without questioning its application to them. The Third, Seventh and Ninth Circuits have applied Rule 29 and this Court by indirection has applied the rule to an appellate court.

Rule 1 provides that these rules govern in the courts of the United States in all criminal proceedings with exceptions provided in Rule 54. Paragraph (a)(1) of Rule 54 includes the United States circuit courts of appeals in the list of courts to which these rules apply. Paragraph (b)(4) and (5) list the exceptions. They are petty offenses on federal reservations, extradition, forfeiture of property, collection of fines and penalties, offenses against the navigation laws, disputes between seamen, fishery offenses, or proceedings against a witness in a foreign country.

Rule 29 has been applied by the Third Circuit in *U. S.* v. *Bozza* (155 Fed. 2d 592); *U. S.* v. *Renee Ice Cream Co.* (160 Fed. 2d 353); and in *U. S.* v. *Johnson* (165 Fed. 2d 42). This Court in *Bozza* v. *U. S.* (330 U.S. 160), by failing to instruct the Third Circuit as to the form this Court's modification was to take, in effect has approved the Third Circuit's judgment of acquittal previously made on other counts.

The Seventh Circuit applied the rule in *U. S.* v. *Gardner* (171 Fed. 2d 753) and again very recently in *United States* v. *Jones* (174 Fed. 2d 746).

The Ninth Circuit in *Karn* v. *U. S.* (158 Fed. 2d 568) considered and applied the rule; and, explained its remand with judgment of acquittal as follows (p. 573):

> "When the motion for a directed verdict was made, the trial judge, as a matter of law, should have instructed the jury to render a verdict of acquittal. The right of appellant to a verdict of acquittal fully matured when he made his motion. To remand the case

with directions to grant new trial would, in our judgment, be a serious invasion of rights which accrued to him in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind. (See comment in Ex Parte U. S.)

"While adhering to the view that this court may remand the case with directions to discharge the appellant, we are also persuaded that Rule 29 of the Federal Rules of Criminal Procedure is properly applicable to this situation, even though the trial was held before the new criminal rules became effective, since this proceeding is 'pending' within the meaning of Rule 59. See *United States v. Bozza*, 3 Cir., 155 Fed. 2d 592, 596. This simplified procedure is suitable to the case at bar.

"The judgment of the district court is reversed and the cause remanded to the district court with directions to vacate the judgment of sentence herein and to enter a judgment of acquittal of the appellant."

Indubitably the rule does apply to the Courts of Appeal. However, the Circuit Court reasons that if the rule applies, then, the rule authorizes the granting of a new trial. In our opinion, there are two errors in that conclusion.

The first is that the holdings of the Court are not of the character that justify a new trial—the holdings of insufficiency of evidence require an acquittal.

Secondly, the motion that the Defendant in the case at bar is entitled to have corrected is the motion for judgment of acquittal made at the close of all the evidence (R. 206). The motion made after verdict (R. 11-13) for judgment of acquittal, or, in the alternative for a new trial is a subsequent motion and rests on the grounds that if the Appellate Court should hold that the grounds for a judgment of acquittal are not present; then, in that event the alternative motion for a new trial is urged. The Appellate Court has found that the evidence was insufficient to establish a *prima facie* case and that the case should not have been submitted to the jury. It did not pass on the errors directed to a new trial. The Appellate Court quite properly addressed itself

to the proper grounds—but those grounds call for a judgment of acquittal and the Defendant is entitled to a judgment of acquittal on the motion made to that end at the end of all the evidence (R. 206).

This Court in *Montgomery Ward & Co.* v. *Duncan* (311 U.S. 243) ruled on the priority of motions, stating at page 253:

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment."

Rule 29 is divided into two parts: (a) Motion for Judgment of Acquittal and (b) Reservation of Decision on Motion. Subsection (a) makes no provision for a new trial—only judgment of acquittal. Here the trial court did not reserve its decision—it ruled promptly on the motion made at the conclusion of all the testimony (R. 206). Subsection (b) has no application to the motion made and ruled on at the conclusion of all the testimony—it comes into play only with the motion made in the alternative after verdict.

Your petitioner is entitled to a judgment for acquittal based on the motion made at the conclusion of all the testimony; and, the Appellate Court is in error in bottoming its reasoning on the subsequent motion provided for in subsection (b), which is the only part of the rule that sanctions a new trial, providing the grounds of reversal are of the nature to justify a new trial instead of a judgment of acquittal.

Point V

Section 2106, Though General, Likewise Requires a Judgment of Acquittal

The Court below rests its authority to grant a new trial on Section 2106 of Title 28 U.S.C.A. (Judiciary and Judicial Procedure) (R. 231).

Title 28, U.S.C.A. (Judiciary and Judicial Procedure) was enacted on June 25, 1948, and Section 2106 authorizes

the Court of Appeals to direct such judgment as may be appropriate and just. It was enacted on the same day that Title 18 (Crimes and Criminal Procedure) was enacted. Title 18, in the last paragraph of Section 3772, preserves intact the Federal Rules of Criminal Procedure and provides for such rules governing despite anything contained in Title 18, U.S.C.A.

Rule 29(a) of the Federal Rules of Criminal Procedure provides the appropriate and just judgment that should be entered upon a holding that the evidence is insufficient to sustain a conviction—that is a judgment of acquittal.

Assuming arguendo, that Rule 29(a) is not controlling before the Court of Appeals; nevertheless, the Court of Appeals is required to direct an appropriate and just judgment; and Rule 29(a) sets forth that judgment—a judgment of acquittal.

It has always been our understanding that where specific legislation — and the rules are legislation because they must be submitted to Congress before they became effective—is enacted, such legislation is controlling, rather than the legislation contained in a general statute.

Rule 29(a) is not inconsistent with Section 2106 of Title 28—it goes beyond the broad generalities set forth in Section 2106, and provides for a specific course of action. A judgment of acquittal is an appropriate and just judgment where the evidence is insufficient to sustain a conviction.

The only judgment the Court of Appeals can direct that is appropriate and just, is a judgment of acquittal.

Point VI

Double Jeopardy

To require the Defendant to again stand trial for an offense that was not established by the first trial is, in our opinion, subjecting him to double jeopardy and an invasion of his rights under the Fifth Amendment to the Constitution.

Under the law (Rule 29(a)) a judgment of acquittal accrued to him at the conclusion of all the evidence. The duty imposed upon the Judge is mandatory—it is not discretionary. He did not waive the right by his appeal—he urged it. Prior to the Federal Rules of Criminal Procedure, it may well be that in order to secure a reversal it was necessary to waive the double jeopardy protection; because, then, the power of the Court was limited to directing the jury to render a verdict of acquittal; and, an Appellate Court could remand for a new trial because it was the jury's function to bring in the verdict. Now, however, the legislation embraced in the Federal Rules of Criminal Procedure, more specifically Rule 29(a), specifically makes it the Judge's function to act, without the channel of a jury. There is no restriction on the Appellate Court in reviewing the trial judge's acts—it directs him to do what he should have done in the first instance. Here, that is a judgment of acquittal.

The Defendant urging a right that had accrued to him is entitled to an order granting him that right. To deny him that right and subject him to another trial is an invasion of his constitutional rights under the Fifth Amendment.

In urging this proposition, we are well aware of the decisions respecting double jeopardy; however, we believe they are all distinguishable by the advent of the Federal Rules of Criminal Procedure.

In the case at bar, the alternative motion for a new trial was made. It was denied by the trial court. The Court of Appeals did not have the right to reverse the trial court for denying the new trial. The only right the Court of Appeals had was to pass not on the question of the proper or improper exercise of the trial court's discretion but upon the question of whether the trial judge had or had not committed prejudicial error in his non-discretional rulings. If the Court of Appeals had found that the trial court had committed error which entitled petitioner merely to a new trial, a reversal for a new trial would have

been proper. But having declined to pass on the points raised and argued which went to the question of errors which entitled petitioner to a new trial and having based its decision solely on the insufficiency of the evidence, it established that petitioner was entitled to an acquittal.

This Court in *Cone* v. *West Virgina Pulp & Paper Co.* (330 U.S. 212) (1947), discusses the discretion under analogous Civil Rule 50(b). The language of this Court's opinion demonstrates why the discretion is in the trial judge and not in the Appellate Court (page 215):

> "Rule 50(b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party. The rule provides that the trial court 'may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.' This 'either-or' language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. See *Berry* v. *U. S., supra*, 452-453. And he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. See *March* v. *Philadelphia & West Chester Traction Co.*, 285 Pa. 413, 418, 132 A. 355, 357; *Bunn* v. *Furstein*, 153 Pa. Super 637, 638, 34 A. 2d 924. See also *Yutterman* v. *Sternberg*, 86 Fed. 2d 321, 324. Exercise of this dis-

> cretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded 'a last chance to correct his own errors without delay, expense or other hardships of an appeal.' See *Greer* v. *Carpenter*, 323 Mo. 878, 882, 19 S. W. 2d 1046, 1047; Cf. *U. S.* v. *Johnson*, 327 U. S. 106, 112, 66 S. Ct. 464, 468."

Here, however, there was no discretion permitted to either court. The evidence was not sufficient to convict. Hence there was not discretion but mandatory duty in the court to acquit and there was an absolute right in petitioner to be acquitted. Neither court had the discretion to disregard that mandatory duty or to deprive petitioner of his absolute right.

On page 217 (Cone case) this Court makes clear why in a civil case the discretion should exist, namely, the right of the plaintiff to dismiss and begin over again. Since in a criminal case the government has no right to dismiss and begin over again once the defendant has been placed in jeopardy, it becomes plain why the criminal rule is different from the civil rule.

The strongest difference between the two rules is this. As this Court said in the Cone case, text 215:

> "Rule 50(b) contains no language which absolutely requires the trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party."

Rule 50(a) contains no such requirements either. However, Criminal Rule 29 does contain such language, to wit:

> "The court * * * shall order the entry of judgment of acquittal * * * if the evidence is insufficient to sustain a conviction * * *."

In the Court of Appeals on the motion petitioner took the position that placing him on trial again would be to

subject him to double jeopardy. The Court of Appeals decided against petitioner. Petitioner raised the point again here.

The Fifth Amendment of the Constitution provides:

> "• • • nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; • • •"

Petitioner was in jeopardy once. While in jeopardy he became entitled to an acquittal. To force him to another trial will put him in jeopardy again. Whatever arguments and refinements based on the law as it existed before the adoption of the rule may be made, the actual condition is that petitioner became entitled to a judgment of acquittal after being put in jeopardy; if he is again tried for the same offense, he will again be put in jeopardy.

The difference between the status before the adoption of the rule and since the adoption of the rule is shown we think by the case of *Stroud* v. *U. S.* (251 U.S. 15, text 18).

> "The only thing the appellate court could do was to award a new trial on finding error in the proceeding, thus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution."

The rule completely changed this. The appellate court now can do something other than award a new trial. It can now require the judgment of acquittal to which petitioner became entitled.

The law seems to be plain that a second trial is double jeopardy. The constitutional provision against double jeopardy is one for the benefit of the petitioner in a criminal case. It confers a right which the defendant may waive. This, we think, was completely settled by the case of *Kepner* v. *U. S.* (195 U.S. 100).

The dissenting opinion of Mr. Justice Holmes emphasizes that a second trial is double jeopardy. He took the

adverse position, arguing that no question of waiver was involved while there was a second trial in the same case. He argued that there can be but one jeopardy in one case (195 U.S. 136).

Petitioner, of course, did not specifically and directly waive anything. The only question is, was there an implied waiver. The best that can be said for an implied waiver is that there was a conditional offer to waive. The offer at most could have been, in substance, only this:

> If you find against me on my claim that I am entitled to a judgment of acquittal because no testimony sufficient to convict me was introduced but find for me on one or more of the other points which I have raised and which go only to my right to a new trial and you reverse only on one or more of these points, then I waive my constitutional right against being placed in jeopardy a second time.

The condition was not complied with, the offer was not accepted. Hence to decline to order the judgment of acquittal but to put defendant on trial a second time will be to deprive him of his constitutional right against double jeopardy, which right he has not only not waived but has insisted on at every stage since that right accrued to him.

The Court of Appeals, in deciding against petitioner on this point, cited four cases. The first was *State of Louisiana ex rel. Francis* v. *Resweber* (329 U.S. 459). This case did not involve Rule 29. In fact, it did not even involve a second trial. The question there was only of a second electrocution. The other three cases cited are *Stroud* v. *U. S.* (251 U. S. 15), *Trono* v. *U. S.* (199 U. S. 521) and *Ball* v. *U. S.* (163 U. S. 662).

Rule 29 was adopted long after these cases were decided and hence was not involved. So far as the opinions show, the sufficiency of the evidence to convict was not the reason for reversal in the above cases. We submit that this case presents a new point that could not have been decided before the rule became effective.

Petitioner became entitled to a judgment of acquittal when (as the Court of Appeals decided) the government failed to make a case against him. He still has that right unless in some way he has lost it. Surely he did not lose his right because the trial judge erroneously deprived him of it, or, as we contend, the Court of Appeals erroneously deprived him of it. We know of no way by which he could lose the right except by waiving it. He has not waived it but has insisted on it at every stage. He made the motion for it both at the conclusion of the government's testimony and at the conclusion of all the testimony. When the judge ruled against him at the trial each time the motion was made and the jury found a verdict against him, he renewed the motion within the five days allowed by the rule.

It is true he also made the alternative motion for new trial provided by the rule. This was not a waiver. In the *Montgomery Ward* case, *supra*, this Court made this clear in passing on the analogous civil rule.

Petitioner insisted on his motion for judgment of acquittal in the Court of Appeals. When the Court of Appeals agreed with petitioner on the insufficiency of the evidence but reversed for a new trial, petitioner further insisted on his right to a judgment of acquittal by a motion in the Court of Appeals (R. 235a). When the Court of Appeals denied his motion petitioner further insisted on his right by his petition for certiorari to this Court. He is still insisting on that right.

Certainly he has not waived it. He is still entitled to it. We respectfully submit he should have it at the hands of this Court.

CONCLUSION

WHEREFORE, because of the errors herein mentioned, your petitioner respectfully prays that the judgment of the Court of Appeals for the Fifth Circuit be modified to direct a judgment of acquittal.

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APPENDIX

Statutes and Rules of Procedure

The pertinent statutes and rules are Section 2106 of Title 28, U.S.C.A.; Section 3772 of Title 18, U.S.C.A.; Rules 1, 29 and 54 of the Federal Rules of Criminal Procedure; and Rule 32 of the Fifth Circuit.

The Statutes:

Section 2106, Title 28, U.S.C.A.

Determination. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Section 3772, Title 18, U.S.C.A. (the last paragraph is particularly pertinent).

Procedure after verdict. The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, District of Columbia, and Virgin Islands, in the Supreme Courts of Hawaii, and Puerto Rico, in the United States Circuit Courts of Appeals, in the United States Court of Appeals for the District of Columbia, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for

and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

The Federal Rules of Criminal Procedure:

Rule 1. Scope.

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 29. Motion for Acquittal.

(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) *Reservation of Decision on Motion.* If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may

be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 54. Subsection (a) (1) is particularly pertinent.)

Application and Exception.

(a) *Courts and Commissioners.*

(1) *Courts.* These rules apply to all criminal proceedings in the district courts of the United States, which include the District Court of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the District Court of the United States for Puerto Rico and the District Court of the Virgin Islands; in the United States circuit court of appeals, which include the United States Court of Appeals for the District of Columbia; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

(2) *Commissioners.* The rules applicable to criminal proceedings before commissioners apply to similar proceedings before judges of the United States or of the District of Columbia. They do not apply to criminal proceedings before other officers empowered to commit persons charged with offenses against the United States.

(b). *Proceedings.*

(1) *Removed Proceedings.* These rules apply to criminal prosecutions removed to the district courts of the United States from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) *Offenses Outside a District or State.* These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by section 102 of this title.

(3) *Peace Bonds.* These rules do not alter the power of judges of the United States or of United States commissioners to hold to security of the peace and for good behavior under section 392 of this title, and under section 23 of Title 50, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) *Trials before Commissioners.* These rules do not apply to proceedings before United States commissioners and in the district courts under sections 576-576d of Title 18, relating to petty offenses on federal reservations.

(5) *Other Proceedings.* These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. They do not apply to proceedings under the Federal Juvenile Delinquency Act so far as they are inconsistent with that Act. They do not apply to summary trials for offenses against the navigation laws under sections 391-396 of Title 33, or to proceedings involving disputes between seamen under sections 256-258 of Title 22, or to proceedings for fishery offenses under the Act of June 28, 1937, sections 772-772i of Title 16, or to proceedings against a witness in a foreign country under sections 711-718 of Title 28.

(c) *Application of Terms.* As used in these rules the term "State" includes District of Columbia, territory and insular possession. "Law" includes statutes and judicial decisions. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in a territory or in an insular possession. "District Court" includes all district courts named in subdivision (a), paragraph (1) of this rule. "Civil action" refers to a civil action in a district court. "Oath" includes affirmations.

"District judge" includes a justice of the District Court of the United States for the District of Columbia. "Judge of a circuit court of appeals" includes a justice of the United States Court of Appeals for the District of Columbia. "Senior circuit judge" includes the chief justice of the United States Court of Appeals for the District of Columbia. "Attorney for the government" means the attorney general, an authorized assistant of the attorney general, a United States attorney and an authorized assistant to a United States attorney. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

Federal Rules of Civil Procedure:

Rule 50. Motion for a Directed Verdict.

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial

may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand and may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If not verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.